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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 187

REALTY OPERATORS, INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

No. 188

WILLIAM HENDERSON (PARTNERSHIP), PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

No. 189

LAURENCE M. WILLIAMS, AS LIQUIDATOR OF STERLING SUGARS, INC., FORMERLY A LOUISIANA CORPORATION, AND STERLING SUGARS SALES CORP., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The Tax Court rendered unreported memorandum opinions in all three of these cases.[1] Its opinion in No. 187 appears at pages 40–43 of that record, in No. 188 at pages 25–34 of that record, and in No. 189 at pages 88–89 of that record.[2] The opinions of the Circuit Court of Appeals (Realty R. 127–129; Henderson R. 164–167; Williams R. 331–335) are reported, respectively, at 153 F. 2d 551, 153 F. 2d 442, and 153 F. 2d 547.

JURISDICTION

The judgment of the Circuit Court of Appeals in No. 187 was entered February 18, 1946, and petition for rehearing denied March 15, 1946. (Realty R. 130, 147.) In No. 188 judgment was entered February 14, 1946, and petition for rehearing denied March 15, 1946. (Henderson R. 167, 184.) In No. 189 also, judgment was entered February 14, 1946, with petition for rehearing denied March 15, 1946. (Williams R.

[1] These three cases involve the same question of law and were consolidated below for presentation and decision. We deal with them here in like manner; this accords also with the taxpayers' wish. See the petitioner's brief in No. 187 at p. 10, in No. 188 at p. 10, and in No. 189 at p. 10.

[2] For convenience and clarity, we shall use herein the following record reference system: Realty R. —, Henderson R. —, Williams R. —.

336, 353.) The petitions for writs of certiorari were severally filed on June 14, 1946.

The jurisdiction of this Court is, in each instance, invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, in any of these cases, the Tax Court erred in holding that the taxpayers, each claiming refund under Title VII of the Revenue Act of 1936 of processing tax payments, failed to establish that they bore the ultimate burden of the tax.

STATUTES INVOLVED

The pertinent statutes are set forth in the Appendix, *infra,* pp. 20–26.

STATEMENT

All three of these petitioners were during the pertinent period processors of sugar operating in the State of Louisiana; and each of them paid at various times and in varying amounts processing taxes levied under the Agricultural Adjustment Act, subsequently invalidated in *United States* v. *Butler,* 297 U. S. 1. Pursuant to authority granted by Title VII of the Revenue Act of 1936, petitioners are seeking in these actions to recover those payments. Under Title VII, right of recovery depends upon proof by the claimant that it actually absorbed the processing tax and did not shift the tax burden to others; accordingly, the

issue is in each instance ultimately factual in character. In each of these cases the Tax Court made extensive findings of fact, and we refer the Court to those findings for detailed accounts of the evidence.[3] We set forth in this statement only those findings which directly substantiate the Tax Court's conclusions that none of the claimants bore the burden of the processing tax, and findings which are otherwise necessary to an understanding of the issue.

1. No. 187. Realty Operators, Inc. v. *Commissioner of Internal Revenue.*

Petitioner, as a first domestic "processor" of sugar within the purview of the Agricultural Adjustment Act, paid a total of $241,791.81 in processing taxes. Its timely claim for refund, fined under Title VII of the Revenue Act of 1936, was disallowed in full. (R. 24–25.)

Petitioner's statutory "tax period" was the period commencing June 8, 1934, and ending October 31, 1935. Petitioner's statutory "period before and after the tax" was the 24 months immediately preceding June 8, 1934, to-wit, June 8, 1932, through June 7, 1934, and the six months February to July, inclusive, 1936. (R. 25.)

In its departmentalized system of accounts the petitioner charged its factories for cane from its own plantations at the current market price at time of processing for sugar cane of like grade and

[3] Realty R. 24–40; Henderson R. 25–34; Williams R. 80–88.

quality in the market where petitioner customarily bought its purchased cane; and in a sworn protest dated August 8, 1940, which was filed with the Commissioner before his disallowance of the claim for refund, the petitioner stated under oath that its accounting procedure with respect to the sugar cane processed was not based on actual cost but on the current market prices. The cost of the cane purchased by petitioner at market value plus the market value of petitioner's own-grown cane for the statutory period before and after the tax was $2,339,171.46 and $949,841.17 for the statutory tax period. (R. 29, 31.)

Petitioner's statutory gross sale value of all articles processed by it from sugar cane during the statutory tax period was $2,116,053.12. The petitioner's statutory gross sale value of all articles processed from sugar cane during the statutory period before and after the tax was $4,113,512.53. The petitioner's statutory units of commodity processed for the statutory period before and after the tax and the tax period, expressed in terms of pounds of 96 degree raw sugar, were 105,634,588 for the period before and after the tax and 49,-021,406 for the tax period. The petitioner's statutory average margin by the unit pound of 96 degree raw sugar for the statutory tax period was $0.01885748 and for the statutory period before and after the tax was $0.01679671 by the unit pound of 96 degree raw sugar, provided cost be

based on the market value of petitioner's own home-grown cane. (R. 31–32.)

The petitioner's statutory average margin by the unit pound of 96 degree raw sugar for the statutory tax period was $0.00206077 in excess of its statutory average margin (by the unit pounds of 96 degree raw sugar) for the statutory period before and after the tax, if the same basis of cost is used. But if the actual cost be used, the average margin for the base period would be $0.018098; for the tax period, $0.016958; and the average margin for the tax period lower by $0.001140 than for the base period. (R. 32.)

On June 8, 1934, the effective date of the tax on the processing of sugar, the price of refined sugar was increased by the claimant and the entire sugar industry by 55 cents for every one hundred pounds. The tax was at the rate of $0.535 by the hundred pounds of refined sugar. A two percent discount was allowed on all sales, making a net price increase of $0.539 by the 100 pounds. At this time, petitioner had no sugar on hand, the 1933 crop having been sold, and the 1934 crop not yet ready for harvest. (R. 32.)

The petitioner's cost of production, *i. e.*, its cost of manufacturing the articles produced from the commodity processed, by the unit pounds of 96 degrees raw sugar, was greater in the tax period than in the period before and after the tax by $0.000553 per unit. Its increased selling ex-

pense was $0.00054; and its depreciation and general expense was $0.002794; with a resulting total increase of cost of $0.003887. (R. 32.)

During the period two years before the tax the quota system was not in effect. During the period six months after the tax the quota system continued in effect although there was no processing tax. The control of supply and demand by means of the quota system made it possible for the sugar industry to make some increase in the price of sugar on and after June 8, 1934. (R. 40.)

Petitioner made no refunds of processing taxes to any of its vendees on sugar sold or delivered prior to January 6, 1936. There is no agreement or understanding, written or oral, whereby the petitioner, or anyone whom the petitioner directly or indirectly controls, or anyone by whom the petitioner is directly or indirectly controlled, may be relieved of or reimbursed for, or may shift, the burden of the tax. (R. 30.)

The Tax Court held (R. 42) that the petitioner had not borne the burden of the tax and sustained the Commissioner's denial of refund. The Circuit Court of Appeals affirmed.

2. No. 188. William Henderson (Partnership) v. *Commissioner of Internal Revenue.*

This petitioner, as a first domestic "processor" of sugar within the meaning of the Agricultural Adjustment Act, paid a total of $1,138,421.82 in

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processing taxes. Its timely claim for refund, filed under Title VII of the Revenue Act of 1936, was also disallowed in full. (R. 26.)

The petitioner's statutory "tax period" for the purpose of the processing tax began June 8, 1934, and ended October 31, 1935. Its statutory margin was $ .00922898 for the tax period and $ .00872695 for the base period. The statutory margin for the tax period therefore exceeded the margin for the base period by $ .00050203. (R. 27–28.)

The quota system limiting the importation of raw sugar, which went into effect as a part of the Jones-Costigan Act on June 8, 1934, resulted in a direct increase in the price of raw sugar. (R. 30.)

At the time the processing tax went into effect the sale price of refined sugar was advanced throughout the sugar industry by approximately the amount of the tax. In a sales memorandum book kept by the petitioner's now deceased sales manager, the following notation was made as of June 8, 1934: "6/8/34—11:23 A. M. Advance to $4.65 to cover sugar process tax." The processing tax rate was 55¢ per cwt. The June 7 sale price was $4.10. (R. 30–31.)

After the imposition of the processing tax the petitioner billed some of its customers for the tax on sales of sugar, syrup, and molasses as a separate item. There were 19 such transactions over the period from June 8 to November 3, 1934, in which the processing taxes aggregated $1,639.19. The

petitioner concedes that this amount of the taxes represented by its claim, in the total amount of $1,138,421.82, was passed on to its vendees and is not recoverable. (R. 31.)

A sales contract which the petitioner executed with one of its customers in Chicago on July 22, 1935, confirming the sale of 1,600 pounds of sugar at $4.90 f. o. b. New Orleans less "10¢ per Cwt. special allowance," carried the following typed-in provision (R. 31):

> It is mutually understood that the basic price includes processing tax of 53.5 per Cwt. which is to be credited to buyer's account if refunded to or withheld by seller due to tax being illegally assessed.

The Tax Court sustained the Commissioner's denial of the refund, finding on the evidence that the taxpayer did not bear the burden of all or any ascertainable portion of the processing tax which it sought to recover. (R. 33.) The Circuit Court of Appeals affirmed.

3. No. 189. Laurence M. Williams, as Liquidator of Sterling Sugars, Inc., formerly a Louisiana Corporation, and Sterling Sugars Sales Corp. v. *Commissioner of Internal Revenue.*

The corporation in this case, as a first domestic "processor" of sugar within the meaning of the Agricultural Adjustment Act, paid a total of $652,503.50 in processing taxes. Timely claim for refund was denied in full. (R. 85.)

The statutory "tax period" of this processor is the period commencing June 8, 1934, and ending October 31, 1935, inclusive; the period for the computation of margins before and after the tax period is the period June 8, 1932, to June 7, 1934, inclusive, and the period from February 1, 1936, to July 31, 1936, inclusive. (R. 83.) The average margin per unit of the commodity processed during the tax period was $.01022; the average margin per unit of the commodity processed during the period before and after the tax was $.00899. (R. 83–84.)

Prior to June 8, 1934, the date of the imposition of the processing tax on sugar, the corporation revised its contract forms covering its sales of sugar to include a clause providing that in the event the tax was imposed, the price of all sugar at that time undelivered should be increased by 107½ percent of the amount of such tax if computed upon a poundage basis and, if not determinable on the basis of poundage, then the price should be increased by the amount by which the seller's cost per pound of refined sugar thereafter delivered would be increased by reason of such tax. This tax clause continued in use on both contracts and invoices of the corporation through the tax period. The processor notified its various sales agents to explain to their customers that all purchases of sugar made from it after June 8, 1934, would carry the tax to be imposed that day. (R. 86.)

The processing tax on sugar at the rate of 53½ cents per 100 pounds of refined sugar was made effective June 8, 1934, and on all the markets for sugar the selling price was immediately, on that day, increased by 55 cents per 100 pounds. This increase was because of the imposition on that date of the processing tax, and, when the customary trade discount of two percent had been allowed on the invoice price, permitted a tax recoupment slightly in excess of the amount of the tax. This corporation, together with other producers of sugar, increased on this date its prices to customers by the amount of 55 cents per 100 pounds and the fluctuation of sugar prices on the market after that date was from the higher level thus set. (R. 86–87.)

On August 8, 1934, the corporation, through its assistant general manager, wrote a letter to the Acting Collector of Internal Revenue at New Orleans, Louisiana, which stated as follows (R. 87):

> We have previously reported our production of sugar during the period of June 8th–July 7th, inclusive. You will find enclosed herewith our report of production from the first moment of July 8th to date.
>
> As was necessary on our other reports we request that we be allowed to withhold payment of processing tax for the full limit of the law, i. e., 180 days, unless the sugar is sold and the tax collected prior to that time.

> We haven't the necessary funds to advance this money to our Government and can only pay this tax when it has been collected from our customers.

In another letter addressed to the Acting Collector under date of September 27, 1934, by the corporation, the following statement was made (R. 87):

> Should your Washington office demand payment to you each month as processing is reported we would be in the position of advancing money to our Government which had not as yet been collected for their account and would impose upon us an undue hardship.

On August 31, 1936, Sterling Sugars Sales Corporation, as agent for Sterling Sugars, Inc., instructed one of its sales agents in the field to advise customers, who requested credit upon invoice prices of the amount of the tax, that it had no responsibility to them to refund the tax which they had paid by its inclusion in the price charged since the amount of the tax thus paid had been remitted by Sterling Sugars, Inc., to the Government, but that if such customers could show that they had not, in reselling the sugar, passed on the amount of this tax to the customers, they should file claim with the Federal Government for its refund. (R. 87–88.)

On February 19, 1936, Sterling Sugars, Inc., through its treasurer and assistant general man-

ager, advised the Journal of Commerce and Commercial of New York that it was issuing affidavits to its customers in order that they might file claims for refund of processing taxes paid by it with respect to sugar purchased by them. (R. 88.)

In a letter to the Commissioner dated January 12, 1938, and following the filing of its "tentative return" claiming refund in the amount of $652,503.50, the processor stated (R. 84–85):

> The schedules enclosed show that the total Processing Tax paid on production was $652,503.50 and that the Processing Tax collected was $651,825.27, leaving a balance of $678.23 Processing Tax paid which was not collected from customers. Although our Claim on Form 79 No. F–1441 was in the amount of $652,503.50, the schedules reveal that the actual amount to be refunded under the claim is only $678.23.
>
> If additional statements are required, won't you kindly so advise us and at the same time grant us an extension of ninety days within which to compile and forward the statements desired.

The Tax Court found (R. 88) that no part of the burden of the amount paid or collected as processing tax for the tax period on its processing of sugar was borne by the corporation, but such burden was shifted to its customers entirely. The Circuit Court of Appeals affirmed.

ARGUMENT

These cases do not warrant further review. They were correctly decided below upon well-established principles of law, and no conflict among the circuits is presented.

There is no merit to petitioners' primary contention that the decisions below conflict with *Webre Steib Co.* v. *Commissioner,* 324 U. S. 164, in that this Court declared in that case (p. 174) that the evidence of universal price increase did not conclusively demonstrate that the claimant there had shifted the tax. In *Webre Steib* the Court was confronted with computations which disclosed a lower margin during the tax period and therefore gave rise under Section 907 of the Revenue Act of 1936 (Appendix, *infra,* pp. 21–26) to a presumption in the taxpayer's favor that it had absorbed a part of the processing tax; whereas in all three of the cases at bar, the margin was higher during the tax period, and this fact gave rise under the statute to a presumption in the Government's favor that all of the tax had been shifted.[4] Since the Court was only concerned in

[4] The Tax Court expressly so found in the *Henderson* and *Williams* cases. (Henderson R. 31, Williams 84.) In the *Realty* case the Tax Court did assume *arguendo* (Realty R. 42) a margin favorable to the taxpayer, but we think it clear that the assumption was fallacious as a matter of law. The statutory computation formula found in Section 907 provides for determining "cost of commodity" by use of either actual

Webre Steib with the value to be given price increase evidence when directed toward rebuttal of the presumed absorption established there under Section 907, or when viewed, after elimination of the statutory presumption, merely as evidence negativing any permissive inference of absorption raised by the lower tax period margin there, the decisions below are clearly not contrary to anything appearing on the point in the *Webre Steib* opinion.[5]

Moreover, unlike *Webre Steib,* where the Tax Court's decision was erroneously based upon the presumption created under Section 907 in the face of countervailing evidence of shift, the statutory presumption was not the foundation for any of the Tax Court decisions with which we here are concerned. All of the instant decisions were based upon the evidence, considered without reference

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cost or of market value, depending upon which of the two is employed by the claimant in his accounting procedure. It was conceded below in both courts that use of market value in the *Realty* results in a margin unfavorable to that taxpayer; and Part II of *Realty* Petitioner's Exhibit 13, pp. 8–9 (not included in the printed record, but filed in the Circuit Court of Appeals in original form under order of that Court, Realty R. 120–121), is an admission to the Commissioner by the *Realty* claimant that its accounting procedure was based on market value rather than on actual cost.

[5] Indeed, this Court specifically declined there to express any opinion at all with reference to operation of the Section 907 presumption or its overthrow in a situation where, as here, it favors the Government. See 324 U. S. at 171.

to Section 907.[6] Thus, as regards the *Williams* and *Henderson* cases, the Tax Court *arguendo* assumed, in ultimate effect, that the taxpayers had successfully rebutted the presumption favorable to the Government which had been theretofore raised in those cases by the margin comparisons; conversely, in the *Realty* case the Tax Court assumed that the presumption which it had previously assumed to operate in favor of the taxpayer had been dispelled by the Government.[7] It then

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[6] Thus, in the *Henderson case*, the Tax Court stated (Henderson R. 33):

> Excluding all consideration of the effect of the statutory presumption the evidence of record, we think, would require us to rule that the petitioner did not bear the burden of all or any ascertainable portion of the processing taxes which it seeks to recover.

In the *Williams* opinion, the Tax Court stated (Williams R. 89):

> We think it clear from the evidence that this presumption not only has not been overcome but, on the other hand, the facts indicate that this claimant absorbed none of the tax but passed this burden on to its customers.

And in the *Realty* case, the Tax Court said (Realty R. 41):

> If we consider the instant case without resort to statutory presumptions in order to determine whether petitioner bore the burden of the tax or passed it on to its vendees * * * we should * * * conclude * * * that petitioner shifted the burden of the tax * * *.

[7] Obviously, the *Henderson* and *Williams* petitioners have nothing about which to complain in respect to this "ruling", for it worked to their interests. And the assumption of overthrow which was made in the *Realty* case finds ample substantiation in the Government's evidence of universal coincident price increase in the sugar industry—precisely the kind of evidence which this Court said in the

proceeded to survey the evidence "as if there had never been a presumption." *Webre Steib Co.* v. *Commissioner,* 324 U. S. at 171.

Actually, it is the petitioners' own position rather than that of the Government which runs counter to *Webre Steib* doctrine; for claimants' proposition is in reality that their evidence not only overcame the presumption of shift arising from the statutory margin comparisons, but that it served also to raise in their favor a new or counter-presumption of absorption. Such an argument cannot be reconciled with this Court's declaration in the *Webre Steib* case, 324 U. S. at 170–171, that once the presumption created under Section 907 is dissipated, the case is to be judged upon all of the evidence *pro* and *con*—without benefit of compelled inference in favor of either party. And with the statutory presumption eliminated, a Title VII cause is no different and calls for application of no different tenets of law than is applicable ordinarily to factual issues; that is the second major rule of the *Webre Steib* case, and it was certainly heeded here by the court below. In accordance with such cases as *Dobson* v. *Commissioner,* 320 U. S. 489, rehearing denied, 321 U. S. 231, and *Commissioner* v. *Scottish American Co.,* 323 U. S. 119, the Circuit Court of

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Webre Steib case, 324 U. S. at 172, *would* suffice to overcome the presumption, whatever its value when considered merely as evidence negativing absorption, absent any presumption.

Appeals declined in the cases at bar to reweigh the evidence or to substitute its own inferences for those of the Tax Court. It properly inquired only whether there was substantial evidence in the respective records to sustain the Tax Court's determination that the claimants, upon whom Section 902 (Appendix, *infra,* pp. 20–21) specifically rested the burden of proof, had not borne the burden of the processing tax.

It seems clear, as the court below held, that the supporting evidence in these cases was more than substantial. We have heretofore mentioned the fact of the sugar industry's universal price increase, which coincided in time and amount with the processing tax.[8] Moreover, and contrary to petitioners' charge here that this was the sole evidence of shift upon which the Tax Court decisions are rested, there was before the Tax Court such affirmative evidence of shift as, for example in the *Henderson* and *Williams* cases, the fact that those petitioners executed sales contracts which reflected inclusion of the processing tax in the price of the product.[9] The *Williams* petitioner once admitted to the Commissioner that no basis existed for its present claim to refund.[10] And perhaps of most consequence is the fact that, under *Webre Steib* doctrine, the statutory margin comparisons here

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[8] Williams R. 86–87; Realty R. 32; Henderson R. 30.

[9] Henderson R. 31; Williams R. 86.

[10] Williams R. 84.

were "evidence" of shift, without regard to their possible "presumptive" effect. Indeed, as this Court said in its *Webre Steib* opinion, the margin comparisons were in themselves "substantial" evidence—they would have supported the Tax Court's determination of shift in these cases even had they stood unaided by any other proof of the ultimate fact. *Webre Steib Co.* v. *Commissioner*, 324 U. S. 164, 174.

CONCLUSION

The petitions for certiorari should each be denied.

Respectfully submitted.

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JULY, 1946.

APPENDIX

Revenue Act of 1936, c. 690, 49 Stat. 1648:

TITLE VII—*Refunds of Amounts Collected Under the Agricultural Adjustment Act*

* * * * *

SEC. 902. *Conditions on allowance of refunds.*

No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2)

through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever.

(7 U. S. C. 644.)

SEC. 907. *Evidence and presumptions*

(a) Where the refund claimed is for an amount paid or collected as processing tax, as defined herein, it shall be prima-facie evidence that the burden of such amount was borne by the claimant to the extent (not to exceed the amount of the tax) that the average margin per unit of the commodity processed was lower during the tax period than the average margin was during the period before and after the tax. If the average margin during the tax period was not lower, it shall be prima-facie evidence that none of the burden of such amount was borne by the claimant but that it was shifted to others.

(b) The average margin for the tax period and the average margin for the period before and after the tax shall each be determined as follows:

(1) *Tax Period.*—The average margin for the tax period shall be the average of the margins for all months (or portions of

months) within the tax period. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month and deduct the processing tax paid with respect thereto. The sum so ascertained shall be divided by the total number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

(2) *Period Before and After the Tax.*—The average margin for the period before and after the tax shall be the average of the margins for all months (or portions of months) within the period before and after the tax. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month. The sum so ascertained shall be divided by the number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

(3) *Average Margin.*—The average margin for each period shall be ascertained in the same manner as monthly margins under subdivisions (1) and (2), using total gross sales value, total cost of commodity processed, total processing tax paid, and total units of commodity processed, during such period.

* * * * *

(5) *Cost of Commodity.*—The cost of commodity processed during each month shall be (a) the actual cost of the commodity processed if the accounting proce-

dure of the claimant is based thereon, or (b) the product computed by multiplying the quantity of the commodity processed by the current prices at the time of processing for commodities of like quality and grade in the markets where the claimant customarily makes his purchases.

(6) *Gross Sales Value of Articles.*— The gross sales value of articles shall mean (a) the total of the quantity of each article derived from the commodity processed by the claimant during each month multiplied by (b) the claimant's sale prices current at the time of processing for articles of similar grade and quality.

(7) The quantity of each article derived from the commodity processed may be either (a) the actual quantity obtained, as shown by the records of the claimant, or (b) an estimated quantity computed by multiplying the quantity of commodity processed by appropriate conversion factors giving the quantity of articles customarily obtained from the processing of each unit of the commodity.

(c) The "tax period" shall mean the period with respect to which the claimant actually paid the processing tax to a collector of internal revenue and shall end on the date with respect to which the last payment was made. The "period before and after the tax" shall mean the twenty-four months (except that in the case of tobacco it shall be the twelve months) immediately preceding the effective date of the processing tax, and the six months, February to July, 1936, inclusive. If during any part of such period the claimant was not in business, or if his records for any part of such period are so inadequate as not to provide satisfac-

tory data on prices paid for commodities purchased or prices received for articles sold, the average prices paid or received by representative concerns engaged in a similar business and similarly circumstanced may with the approval of the Commissioner, where necessary for a fair comparison, be substituted in making the necessary computations. If the claimant was not in business during the entire period before and after the tax, the average margin, during such period, of representative concerns engaged in a similar business and similarly circumstanced, as determined by the Commissioner, shall be used as his average margin for such period.

* * * * *

(e) Either the claimant or the Commissioner may rebut the presumption established by subsection (a) of this section by proof of the actual extent to which the claimant shifted to others the burden of the processing tax. Such proof may include, but shall not be limited to—

(1) Proof that the difference or lack of difference between the average margin for the tax period and the average margin for the period before and after the tax was due to changes in factors other than the tax. Such factors shall include any clearly shown change (A) in the type or grade of article or commodity, or (B) in costs of production. If the claimant asserts that the burden of the tax was borne by him and the burden of any other increased costs was shifted to others, the Commissioner shall determine, from the effective dates of the imposition or termination of the tax and the effective date of other changes in costs as compared with the date of the

changes in margin (when margins are computed for weeks, months, or other intervals between July 1, 1931, and August, 1936, in the manner specified in subsection (b)), and from the general experience of the industry, whether the tax or the increase in other costs was shifted to others. If the Commissioner determines that the difference in average margin was due in part to the tax and in part to the increase in other costs, he shall apportion the change in margin between them;

(2) Proof that the claimant modified existing contracts of sale, or adopted a new form of contract of sale, to reflect the initiation, termination, or change in amount of the processing tax, or at any such time changed the sale price of the article (including the effect of a change in size, package, discount terms, or any other merchandising practice) by substantially the amount of the tax or change therein, or at any time billed the tax as a separate item to any vendee, or indicated by any writing that the sale price included the amount of the tax, or contracted to refund any part of the sale price in the event of recovery of the tax or decision of its invalidity; but the claimant may establish that such acts were caused by factors other than the processing tax, or that they do not represent his practice at other times. If the claimant processed any product in addition to the commodity with respect to the processing of which there was paid or collected an amount as tax for which he claims a refund, and if the Commissioner has reason to believe that the burden of such amount was shifted in whole or in part by means of the transactions relating to such product, the

average margin with respect to such product, and articles processed therefrom, shall also be considered, and shall be determined for the tax period applicable to the commodity and for the period before and after the tax in the manner prescribed in subsection (b) of this section. To the extent the Commissioner determines that the average margin with respect to such product was higher during the tax period than it was during the period before and after the tax, it shall be prima-facie evidence that such amount was not borne by the claimant but that it was shifted to others.

(7 U. S. C. 649.)

U. S. GOVERNMENT PRINTING OFFICE: 1946

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

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COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

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LAURENCE M. WILLIAMS, as LIQUIDATOR OF STERLING SUGARS, INC., formerly a LOUISIANA CORPORATION, and STERLING SUGARS SALES CORP., *Petitioners,*
v.
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR RECONSIDERATION OF DENIAL OF WRITS OF CERTIORARI—OCTOBER 14, 1946.

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LIST OF AUTHORITIES CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 187.

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v.

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No. 188.

WILLIAM HENDERSON (PARTNERSHIP), *Petitioner,*

v.

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No. 189.

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v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR RECONSIDERATION OF DENIAL OF WRITS OF CERTIORARI—OCTOBER 14, 1946.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

This Court denied the petitioners' applications for writs of certiorari to the Fifth Circuit Court of Appeals on October 14th. We respectfully request the Court to reconsider its decision not to grant the writs for the reason that unless this Court does grant the writs, your petitioners will be

denied the justice obtained by numerous other sugar processors. There is

No Question of Law to be Decided.

—only an opportunity to have the Tax Court apply the law as expounded by this Court in *Webre Steib Co., Ltd.* v. *Com.* (324 U. S. 164)—because the Tax Court decided the instant cases before this Court construed the applicable law. Nor is the *Dobson* rule of law at issue because it certainly can have no application where, as here, the Tax Court acted on a theory since rejected by this Court in the *Webre Steib* (supra) case. The same exercise of discretion that prompted this Court to hear and remand to the Tax Court the *Webre Steib* (supra) case, requires that the cases at bar be remanded—because

The Basic Facts in the Instant Cases are on All-Fours with the Webre Steib Case.

in almost every particular—to the extent that even the seasonal operation exists in *Realty Operators, Inc.* (No. 187). They involve the same sugar industry, are located in the same state, serve the same market, and are governed by the same general set of facts—especially the price advance of June 8, 1934.

Since this Court construed the statute,

The Tax Court Has Followed the Webre Steib Case and as a Result Thereof a Number of Other Sugar Cases Have Been Settled.

In *South Coast Corporation*, another sugar case, (T. C. Memo Decision Docket No. 2165, decided June 11, 1945) the Tax Court followed the rule laid down by this Court and held the June 8, 1934 price rise not controlling, stating:

> "It must be remembered that fluctuations in price of refined sugar are due to many causes other than tax imposition."

Those are the words of Judge Leech after this Court spoke; whereas before this Court spoke, Judge Leech in respect to one of your petitioners said:

> "The Processing Corporation, together with other producers of sugar, increased on this date its prices to customers by the amount of 55 cents per 100 pounds *and the fluctuation of sugar prices on the market after that date was from the higher level thus set.*" (Italics supplied) (Williams No. 189, Record 87)

Counsel in the cases at bar—since the *Webre Steib* decision—has settled six sugar processing and unjust enrichment tax cases pending before the Tax Court, namely Docket Nos. 108,029; 111,018; 111,050; 109,622; 110,073 and 424 PT; and, previously the *Insular Sugar Ref. Co.* (141 Fed. 2d 713) was awarded a refund by the U. S. Court of Appeals for the District of Columbia.

Therefore your petitioners are in the unique position of being the sole sugar processors denied

Equal Justice Under Law.

unless this Court grants certiorari and remands the cases to the Tax Court. We appeal to this Court not to permit the rights of your petitioners to lapse without giving the Tax Court the opportunity to apply the law as it was later construed.

There is no law to be briefed, argued and decided—all of that has been done. All that is needed is a remand to the Tax Court so that it may apply the decided law.

Authorities.

Somewhat analogous situations have arisen before this Court in the past, and it has given relief where an intervening event has caused the judgment of the lower court to be in error. Here the decision of this Court in *Webre steib Co., Ltd.* v. *Com.* (supra) construing the processing tax refund statute is an intervening event that requires correction of the Tax Court's theory of the law of the case.

In *Watts, Watts & Co. Ltd.* v. *Unione Austriaca di Navigazione* (248 U. S. 9) in an opinion by Mr. Justice Brandeis this Court reversed a lower court because of an intervening proclamation by the President declaring a state of war, and said:

> "And in determining what justice now requires the court must consider the changes in fact and in law which have supervened since the decree was entered below."

In *Butler* v. *Eaton* (141 U. S. 240) this Court reversed a judgment that was correct when rendered, but became incoreect by a subsequent decision of this Court in a related matter. In *William Crozier* v. *Fried. Krupp Aktiengesellschaft* (224 U. S. 290) an intervening Act of Congress caused this Court to reverse a lower court that had correctly decided an issue before the legislation was passed.

In *Gulf, Colorado & Santa Fe Railway Company* v. *W. R. Dennis* (224 U. S. 503, 32 S. Ct. 542), this Court reversed a lower court, stating: (32 S. Ct. 544)

> "The present case is not one in which the writ should be dismissed, because that would leave the judgment to be enforced as rendered, which the intervening decision shows ought not to be done."

As recently as 1940, in an opinion by Chief Justice Hughes, in *Carpenter* v. *Wabash Ry. Co.* (309 U. S. 23, 27), the Court reaffirmed the rule stated by Chief Justice Marshall in *U. S.* v. *Schooner Peggy* (1 Cranch 103, 110):

> "It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. * * * In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside."

On February 1, 1943, in an opinion by Mr. Justice Reed in *Ziffrin, Inc.* v. *U. S.* (318 U. S. 73), this Court said: (page 78)

> "A change in the law between a nisi prius and an appellate decision requires the appellate court to apply the changed law."

The decisions of the Tax Court, in the cases at bar, were correct when rendered only in the sense that there was no higher authority existing on that date. This Court's subsequent decision in Webre-Steib (*supra*) made those decisions wrong.

THEREFORE, it is prayed that this Court will reconsider the petitions for certiorari; grant the writs and order the cases remanded to the Tax Court with instructions to weigh the evidence and arrive at conclusions of law consistent with the law expounded in *Webre Steib Co., Ltd.* v. *Com.* (supra).

Respectfully submitted,

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CARL J. BATTER, a member of the bar of this Court, certifies that the preceding petition for reconsideration is made in good faith and not for delay, and in the sincere conviction that the ends of justice will be best served if the writs are granted.

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